



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 9, 2019

Ms. Katheryne Ellison
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2019-28429

Dear Ms. Ellison:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 788802 (Ref. No. HC071819C).

The Houston Independent School District (the "district") received a request for information pertaining to a named district employee. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit 6 consists of a completed investigation subject to section 552.022(a)(1) that must be released unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you assert this information is excepted from disclosure under

sections 552.103 and 552.107 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); see also Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, none of the information in Exhibit 6 may be withheld under section 552.103 or section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information at issue. Further, as section 552.101 of the Government Code makes information confidential under the Act, we will consider the applicability of this exception to the information at issue. Further, we will address your arguments for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;

(B) between the client’s lawyer and the lawyer’s representative;

(C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action;

(D) between the client’s representatives or between the client and the client’s representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See Open Records Decision No. 676 (2002)*. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S. W.2d 453, 457 (Tex. App.—Houston [14th Dist] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The district informs us Exhibit 6 consists of an investigation report. The district states the information at issue was communicated between attorneys for the district and district employees in their capacities as clients and client representatives. The district explains the information was created in furtherance of the rendition of professional legal services to the district. The district states the information at issue was intended to be confidential and confidentiality has been maintained. Based on your representations and our review, we find the Exhibit 6 consists of a communication protected by the attorney-client privilege. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Accordingly, the district may withhold Exhibit 6 under rule 503 of the Texas Rules of Evidence.¹

Section 552.103 of the Government Code provides, in part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

¹ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). We note a pending complaint of employment discrimination with the Texas Workforce Commission indicates litigation is reasonably anticipated. *Cf.* Open Records Decision Nos. 386 at 2 (1983) (pendency of complaint before the Equal Employment Opportunity Commission indicates substantial likelihood of potential litigation under statutory predecessor to section 552.103), 336 at 1 (1982).

You state, and provide documentation demonstrating, prior to the receipt of the request for information, a complaint was filed against the district with the Texas Workforce Commission Civil Rights Division. Upon review, we find you have demonstrated litigation was reasonably anticipated when the district received the request for information. You claim, and we agree, the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree the district may withhold the remaining information under section 552.103 of the Government Code.²

However, we note once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the district may withhold Exhibit 6 under rule 503 of the Texas Rules of Evidence. The district may withhold the remaining information under section 552.103 of the Government Code.

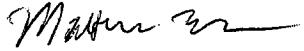
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable

² As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Taylor", with a long horizontal flourish extending to the right.

Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/gw

Ref: ID# 788802

c: Requestor